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Romania

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Musat & Asociatii

Intellectual property

1 Intellectual property law

Under what legislation are intellectual property rights granted? Are there restrictions on how IP rights may be exercised, licensed or transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

The following enactments govern IP law in Romania:

- Law No. 8/1996 of 14 March 1996 on Copyrights and Related Rights (the Copyright Law);
- Law No. 84/1998 of 15 April 1998 on Trademarks and Geographical Indications and its implementing Regulation;
- Law No. 64/1991 of 11 October 1991 on Patents and its implementing Regulation;
- Law No. 93/1998 of 13 May 1998 on Transitional Protection of Patents;
- Instruction No. 146/2006 from 28 December 2006 on the Supplementary Protection Certificate for Medicinal Products or for Plant Protection Products;
- Law No. 350/2007 of 03 December 2007 on Utility Models;
- Law No. 129/1992 of 29 December 1992 on Industrial Designs;
- Law No. 16/1995 of 06 March 1995 on the Protection of Topographies of Semiconductor Products and its implementing Regulation; and
- Law No. 255/1998 of 30 December 1998 on the Protection of New Plant Varieties and its implementing Regulation.

The transfer and the licence of IP rights are generally not restricted unless expressly provided by the law, or the licence agreement has such special provision. However, the most important situations where the transfer is restricted by law are as follows:

- For patents, a distinction should be made between conventional and mandatory licence. As far as the conventional licence is concerned, the only legal restriction is regarding the sub-licence, which must be approved by the licensor. A mandatory licence is non-transferable, unless it is acquired together with the business (fond de commerce) or with a part of the business to which it refers.
- For trademarks, identical or similar marks belonging to the same owner that are used for identical or similar goods or services may be assigned only as a whole and only to one person, subject to the annulment of the deed of assignment.
- For integrated circuit topography, the only restriction concerns the mandatory licence, which can be transferred by the licensee only together with the patrimonial rights that were considered by the court of law when issuing the mandatory licence.
- For the new plant varieties, a restriction that is worth mentioning is in the case of a conventional non-exclusive licence, where the licensee does not have the right to transfer the right of exploitation to third parties.

Romania signed the TRIPs Agreement on December 1994. This agreement was ratified by the Romanian parliament on 22 December 1994 according to Law No. 133/1994, but has only been applicable in Romania since 1 January 2000.

Romanian IP law exceeds the minimum requirements of TRIPs in certain areas (eg, under TRIPs the minimum copyright protection term is 50 years whereas in Romania it is 70 years).

2 Responsible authorities

Which authorities are responsible for administering IP legislation?

Generally, there are two exclusively specialised Romanian authorities that deal with the protection of IP rights: the State Office for Inventions and Trademarks (OSIM) for industrial property, and the Romanian Copyright Office (ORDA) for copyright and related rights.

In addition, several other authorities complete the institutional framework in this field, such as the customs authorities, which may be required to detect and seize any goods imported into or exported from Romania that may possibly infringe IP rights protected in Romania.

The main tasks of OSIM are as follows:

- reviewing the applications received in relation to patents, trademarks and any other industrial property right falling within its jurisdiction;
- maintaining and updating the national registers of patent and trademark applications as well as various other registers regarding the patents and trademarks already granted, along with other aspects directly related to their validity, such as exclusive or non-exclusive licences and assignments, and court judgments affecting the validity of the rights mentioned;
- editing and publishing the Official Industrial Property Bulletin with its sections on patents, supplementary protection certificates, trademarks, and industrial designs;
- regularly publishing the Romanian Industrial Property Review as well as other publications designed for the promotion of its activity;
- rendering specialised services in the field of industrial property, upon request, such as documentary research on industrial rights already granted that may come into conflict with envisaged applications;
- examining and authorising the industrial property attorneys;
- organising training courses, seminars and symposiums on industrial property topics, upon request;
- ensuring the protection of industrial property according to the special laws and international agreements to which Romania is a party; and
- fulfilling any other tasks deriving from the legal provisions and the international agreements to which Romania is a party.

The main tasks that ORDA performs are as follows:

- organising and managing, subject to a fee, the registration of copyright and related rights with the national registries and other specific national records provided for by law;

- issuing authorisations for the establishment and functioning of the collective management copyright organisations;
- endorsing, according to law, registrations with the registry existing at the court clerk's office of the associations and foundations established in the copyright and related rights field, as well as the associations fighting against piracy;
- keeping record of all the repertoires submitted by the collective management organisations;
- ensuring the records of arbitration procedures carried out according to law;
- providing, subject to a fee, technical and scientific expertise regarding the original character of products bearing copyright or related rights, at the request of the criminal authorities; and
- fulfilling any other tasks deriving from the legal provisions and the international agreements to which Romania is a party.

3 Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights?

The enforcement of industrial property rights may initially be achieved at administrative level by means of an opposition or appeal filed with OSIM, requesting that it rejects an application for the registration of conflicting industrial property rights. By contrast, copyrights are not usually protected at the administrative level under the same above terms, as their registration with ORDA is not mandatory.

The IP right holder may also go directly to the courts of law in order to enforce its rights for the cancellation of such registration in a civil procedure, or he or she can initiate criminal proceedings against the infringers.

Both the civil and the criminal actions are available to the holder of an IP right against the alleged infringing person, be they a natural or a legal person. However, the most common proceedings in relation to IP rights infringement are civil court actions, as they take less time and allow the claimant to ask for damages.

In addition to the above available proceedings, the IP rights holder can also file a written request to the National Customs Authority, which, based on an approved intervention application, may retain any imported articles suspected of infringing the IP rights for which the application has been approved, or may suspend customs' clearance, notifying in writing both the right holder and all other relevant parties connected with the imported goods.

Customs surveillance measures are governed in Romania by Law No. 344/2005 enacted on 19 January 2006 and which came into force on 1 February 2006, as well as Commission Regulation (EC) No 1891/2004 of 21 October 2004 laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain IP rights and the measures to be taken against goods found to have infringed such rights. The underlying principle laid down by the aforementioned laws is that any merchandise suspected of infringing IP rights that benefit from protection in Romania may not enter or exit the Romanian territory, free zones or warehouses and may not be imported, exported, re-exported or placed under a suspensive procedure in Romania.

To such effect, the domestic customs authority is vested with various discretionary powers that enable them to act on their own initiative and suspend the release of goods that they deem as potentially infringing IP rights protected in Romania. However, in order to ensure a higher degree of protection, the law on IP rights enforcement also enables IP rights holders to apply for intervention by the customs authorities, in which case they are bound to intervene every time there is an indication that the merchandise waiting to enter the Romanian territory may infringe the IP rights of the applicant.

In order for the customs authority to intervene, the right holder must file a written request with the National Customs Authority (ie, the application for intervention), the form of which is established by the aforementioned EC Regulation. This application has to be

accompanied by all the supporting documentation required by law.

Where the National Customs Authority approves the application, it also sets out the intervention period of up to one year, which may be extended for one than more year upon the request of the IP rights owner. If the application is refused, the decision of the National Customs Authority may be challenged before the court of law.

4 Remedies

What remedies are available to a party whose IP rights have been infringed?

An IP rights holder has no remedy on an administrative level other than the rejection of the conflicting or unlawful industrial property right in question.

Should the IP rights holder choose to address a court of law in order to protect its IP rights, the remedies available are the damages that the infringer will most likely be compelled to pay with a view to the recovery of the prejudice suffered by the claimant. The damages received can be non-pecuniary (or moral), as well as pecuniary. In addition to the damages received, other remedies available to the IP rights holder include the possibility of claiming for the infringing products and the production utilities to be destroyed. Where criminal proceedings occur, the sanction applicable to an infringer of IP rights can be a criminal fine or even imprisonment.

Other remedies available to IP rights holders are governed by the law on IP rights enforcement, which provides that before the customs intervention application is filed or during the application's approval period, the customs authority may suspend the customs clearance or retain the imported articles, or both, if it suspects the articles infringe a protected trademark, patent or any other industrial property right.

Moreover, an effective remedy for the IP rights holder is that the infringing goods can be destroyed by the customs authority. Nonetheless, if a civil or a criminal complaint has been filed in order to contest the seizure of goods or to oppose such destruction of goods, the customs authorities will keep the products until a final and irrevocable decision is rendered, or as the case may be, until an amicable settlement of the case.

According to the Government Ordinance No. 100/2005 transposing Directive EC/48/2004 regarding the enforcement of IP rights, the courts may order, at the plaintiff's request, that the infringer reveal the origin of the infringing goods and the distribution channels.

The infringer might also be ordered, at its own expense, to publish court decisions and to ascertain the dissemination of the information concerning these decisions. Under some particular circumstances, this may include prominent advertising at the defendant's expense.

5 IP legislation and competition

Does IP legislation make any specific mention of competition or contain provisions on the anti-competitive or similar abuse of IP rights?

The IP legislation does not make any specific mention of competition. However, it is generally accepted that it is possible for IP rights to confer upon their respective holders a monopoly on the market of the products covered by such rights. To that effect, the conduct of the IP right holder may be subject to Law No. 21/1996 of 1 February 1997 as further amended and republished in the Official Gazette No. 742 of 16 August 2005 (the Competition Law). Moreover, the abusive exercise of an IP right may be sanctioned according to the general rules governing the abusive exercise of a right by its holder.

6 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

It is worth noting from the outset that the law on trademarks prohibits not only the infringement of a protected trademark by means of using a similar or identical trademark for similar or identical

products or services; taking advantage of the reputation of a trademark by creating the false impression that a mark has the same origin as a well-known trademark may also amount to infringement. Moreover, trademark dilution may give rise to a classic trademark infringement case. However, there are other laws that also regulate deceptive practices, such as Law No. 245/2005 on the general safety of products, which sets out certain requirements in relation to the packaging of certain products, such as a clear indication on product's content, origin and producer.

Deceptive practices may also be prohibited under Law No. 158/2008 governing misleading and comparative advertising. However, as opposed to misleading advertising (which is prohibited under all circumstances), comparative advertising is considered lawful if it complies with certain legal requirements.

7 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

The protection of DRM and TPMs is enforced by the means of article 138(5) of the Copyright Law. The Copyright Law does not, however, provide for special remedies in the said cases, the applicable remedies being the same as for the protection of IP rights in general. Romania case law regarding TPMs and DRM is very limited and these measures could be challenged on the basis of the user's rights to fair use or the right to a private copy. Moreover, if the technical measures adopted by an owner raise anti-competitive concerns, the Competition Law would be enforceable, as with any other anti-competitive practice.

8 Industry standards

What consideration has been given in legislation or case law to the impact of the adoption of proprietary technologies in industry standards?

In Romania, organised standardisation activities covering the whole of the national economy began in 1948 with the creation of the Standardisation Commission within the government. On 31 October 1998, the Romanian Standards Association (ASRO) took over this position as a specialised private body of public interest in the area of standardisation; this is a non-profit association authorised by the government, replacing in this respect the former Romanian Standards Institute.

As per Law No. 355/2002, the Romanian government granted ASRO governmental recognition as a national standardisation body, developing activities in all fields of European and international standardisation as a member of ISO, IEC, CEN, CENELEC and ETSI. ASRO is the owner of all IP rights on national standards and the only body authorised to distribute, through selling, national, European and international standards and to assure the respect of such IP rights on the above.

Where proprietary technologies are concerned, no special consideration is given in the legislation or Romanian case law. However, it is likely that the Competition Council will refer to the relevant cases from the European Commission's practice, such as the pending *Rambus* case.

Competition

9 Competition legislation

What legislation sets out competition law?

The primary legal provisions dealing with the abuse of a dominant position, anti-competitive practices and mergers and acquisitions are to be found in the Competition Law. A great volume of secondary legislation in the form of regulations and guidelines has been adopted

and reviewed by the Competition Council with a view of ensuring a proper application of the Competition Law.

In the wake of Romania's accession to the European Union, the EC Treaty provisions and EC Regulations are also directly applicable in Romania. The ECJ case law and the European Commission's practice also constitute important guidelines for both the competition authority and market players.

10 IP rights in competition legislation

Does the competition legislation make specific mention of IP rights?

No, the Competition Law does not specifically include or exclude IP rights from its application. However, whenever the exercise of an IP right is likely to distort the competition on the relevant market, the Competition Law is undoubtedly applicable. Depending on its main purpose, an agreement involving IP rights may be subject to alternative regulations or guidelines (or both) of the Competition Council, such as the block exemption regulation on technology transfer agreements, alongside its subsequent guidelines, or the guidelines on horizontal agreements (ie, between competitors).

11 Review and investigation of competitive effect

Which authorities may review or investigate the competitive effect of conduct related to IP rights?

The Competition Council is the domestic authority entrusted with the review or investigation of agreements or unilateral practices, including IP rights-related conduct potentially having anti-competitive effects on the Romanian market. Pursuant to the law, the Council is empowered to examine the competitive conduct of undertakings on a specific markets either ex officio or in response to a complaint lodged by a third party and to apply sanctions or take any measures necessary to ensure a normal competitive environment.

12 Competition-related remedies for private parties

Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

Private parties are granted the right to signal to the Competition Council any presumptive anti-competitive behaviour that allegedly adversely affects their activities. The Competition Council will scrutinise such a complaint and correct any infringements of the competition rules, if proven. Nonetheless, there is no legal impediment to a private party directly addressing the court to request an the infringement be put to an end and award damages that cover the prejudice suffered as a result of the anti-competitive behaviour.

13 Competition guidelines

Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

To date, the Competition Council has not passed any general guidelines concerning the per se overlap of competition and IP law. However, as previously mentioned, the Competition Council issued a block exemption regulation and guidelines in 2005 with respect to agreements involving the transfer of technology, enactments that are in compliance with the Community legislative framework.

14 Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

The block exemption regulation and guidelines with respect to agreements involving the transfer of technology exempts agreements concerning the assignment or use of industrial property rights from the application of the Competition Law, subject to the fulfilment of a number of cumulative conditions. These conditions are meant to ensure that the normal competitive environment is not distorted by the agreement in question.

15 Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

Article 13 of the Copyright Law provides that the author of an original work has exclusive rights to use and exploit that work, which also includes distribution of the work or products subject to the protected copyright. However, article 14 clarifies that the exclusive rights over the distribution of the original work are exhausted after the first sale or the first ownership transfer of the work by the author or by the right holder.

16 Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

Parallel trade is generally perceived as positively contributing to the achievement of a common market, which is the main objective of the EC Treaty. Given that the exclusive distribution rights are exhausted once products are put on the market for the first time, a right holder cannot control the route of the product. However, depending of the type of product, parallel trade may be limited in other legal ways. For example, in the wake of the ECJ's recent judgment in the *SYFAIT* case, the owner of a patent who is also the producer of the pharmaceutical products covered by the patent may control the parallel trade by limiting the supply to a country based on local demand.

17 Competent authority jurisdiction

Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

No, the Competition Law does not provide for such a possibility; in fact, the Competition Council would be even less likely to defer any case relating to IP rights and over which it has jurisdiction considering the fact that it is in a process of strengthening its role on the Romanian market.

Merger review**18 Powers of competition authority**

Does the competition authority have the same powers with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

A merger involving IP rights is examined pursuant to the same procedure as any other economic concentration.

19 Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

No, the national competition authority examines any merger pursuant to the same procedure and principles, whether or not it involves a transfer of IP rights. Nonetheless, every merger presents its particular features that need to be analysed in respect of the effects that it may produce on the market. Consequently, the Competition Council will scrutinise the effects that may be entailed by such transfer of IP rights, for instance, the possible creation of a dominant position or the strengthening of entry barriers, etc.

In all circumstances, the Competition Council will also consider the IP rights held by both parties involved in the transaction (ie, the acquirer and the target entity) and will ascertain to what extent they overlap or leave room for vertical integration. Products

undergoing research and development may also indicate, from the point of view of the Competition Council, a potential increase in the market power of the acquirer or the resultant entity, as well as market foreclosure.

On markets dominated by IP rights, such as the pharmaceutical market where patents are crucial and the beer market where brands significantly influence local demand, the acquisition of long-term exclusive licence agreements of patents or brands may in itself amount to an economic concentration subject to the prior authorisation of the Competition Council, should the applicable turnover thresholds be met.

The remedies for alleviating the restriction of competition in relevant markets also differ in case the merger or the acquisition envisages primarily IP rights. For more details in this respect, please refer to question 21.

20 Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

Merger control applies to all concentrations falling under the scope of the Competition Law, irrespective of the transferred business or the manner of achieving such effect. As such, a merger involving the transfer of IP rights is subject to the same means of challenge as any other merger.

As per the law, the Competition Council may prohibit the implementation of any economic operation by the parties thereto if it finds that it will either give rise to or consolidate a dominant position on the affected markets. However, the law does not clarify what is meant by 'dominant position', the definition of such concept being left to the competition authority and to the courts of law. It should be noted that although the European Commission's practice is closely followed by the Competition Council, in an older case the national authority found a dominant position and an abuse even when the concerned company enjoyed a market share of only around 20 per cent, and this was due to the company's apparent capacity to act independently in relation to its customers, competitors and final consumers.

21 Remedies to alleviate anti-competitive effect

What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

With a view to preventing the creation or strengthening of a dominant position on a market, the Competition Council is vested with certain powers aimed at ensuring the compatibility of merger operation with the competitive environment.

Thus, the Competition Council may accept either behavioural or structural remedies proposals by the parties involved in a merger that, if implemented immediately after the authorisation of the merger, will ensure that a dominant position on the market is neither created nor consolidated. Consequently, the parties may have to divest parts of the business or reduce market activities as per the Competition Council's recommendations. Nonetheless, the offering of remedies may be rejected if they are considered unsatisfactory, and the merger still opposed.

It should be noted that the offering of remedies is never mandatory; it is up to the parties to offer remedies in order to avoid a negative decision by the Competition Council. The types of remedies offered (ie, structural or behavioural) are also chosen by the parties, but they also have to be accepted by the Competition Council in order for it to issue a conditional authorisation rather than a refusal.

In mergers involving transfer of IP rights, the most common remedies are the divestiture of certain IP rights or the exclusive or non-exclusive grant of licences to third parties; these are usually competitors holding the means of exploiting the IP rights to their maximum capacity in order to ensure effective competition on the market against the new entity resulting from the merger.

The Competition Council may impose fines upon companies implementing concentrations either in breach of a prohibition or a conditional authorisation, or for reasons regarding non-notification.

Specific competition law violations

22 Conspiracy

Describe how the exercise, licensing, or transfer of IP rights can relate to cartel or conspiracy conduct.

The Competition Law prohibits any conduct on behalf of undertakings that may be qualified as restricting or distorting competition. As such, cartels (which include conspiracies) are prohibited per se by the Competition Law. IP rights-related cartels also fall under the same rules and so constitute per se infringements of the Competition Law. However, other cases of intercompany cooperation that relate to IP rights should be assessed in respect of their compatibility with competition rules on a case-by-case basis.

Although the Competition Law does not expressly rule upon matters such as patent pools or copyright collectives, relevant provisions may be found in secondary enactments concerning the competition field. As such, the Competition Council's regulation on technology transfer agreements regulates the manner in which cooperation concerning IP rights is to be handled so as not to contravene competition rules.

23 (Resale) price maintenance

Describe how the exercise, licensing, or transfer of IP rights can relate to (resale) price maintenance.

In accordance with Community-level enactments, as per the provisions of the Competition Law, in agreements that bring together non-competitors, it is permitted for the producer to impose maximum resale prices on its distributors, as well as to recommend certain resale prices to them.

The law prohibits any conduct solely the fixing of minimum resale prices, deemed anti-competitive. Recommendations made by the IP rights owner in relation to a minimum price to be applied by its licensees may raise concerns on the part of the Competition Council if all the licensees apply the same minimum price as recommended by the IP rights owner, leading in the end to effective competition being eliminated from the market.

However, agreements concluded between competitors that contain clauses concerning the imposition or recommendation of prices may amount to unlawful practices, prohibited by the law as illegal horizontal price fixing.

24 Exclusive dealing, tying and leveraging

Describe how the exercise, licensing, or transfer of IP rights can relate to exclusive dealing, tying and leveraging.

The Competition Council acknowledged in several of its decisions that a company may be dominant on a given product market and abuse its position on a different secondary market. This is particularly the case when the product traded on the market on which the respective company is dominant represents an essential facility on the secondary market, in the absence of which effective competition cannot be maintained. Within this context, the dominant company cannot reserve the secondary market for itself and it is therefore obliged to grant access under reasonable terms to its products amounting to essential facilities.

There is little practice by the Competition Council in this area and therefore the concept of essential facilities was not properly defined. However, when it had to deal with this concept, the Council referred to and used European Commission practice as a guide. In one of its decisions (*Romanian Shareholders' Registry*), the Competition Council stated that the unjustified refusal to supply, to buy, to grant certain licences or to guarantee access to certain essential facilities amounts

to an abuse of dominance. In this case, the Romanian Shareholders Registry (RSR) had for a long time been the only provider of services related to shareholder registries for companies that were under a legal obligation to keep such internal documents updated. After the National Securities Commission (NSC) authorised other 10 private companies to provide the same service, RSR attempted to hinder the transfer and infringed article 6 by imposing more conditions than required by the law for such transfer to operate, for example, requiring the beneficiaries that opted for the transfer to pay for services allegedly provided before the signing of the agreement, withdrawing all the facilities granted under the agreement and asking for immediate payment thereof, etc. In the absence of any of the foregoing RSR would refuse to hand over the shareholder registry held that it held until that time, thus so preventing the transfer to any of the private companies authorised by NSC. The Competition Council found the attempt abusive as it was not justified and prevented effective competition being brought into the monopolistic market.

In a subsequent case from 2004, the Competition Council found that the cessation of the supply of two components essential for the production of a pharmaceutical product named Piafen, where there were no other substitutes for these components, was contrary to the Competition Law due to the lack of a reasonable economic justification. The producer of the two components entered into individual supply agreements with two undertakings producing Piafen and subsequently ceased the supply only in relation with one of them. Although the Competition Council underlined the monopolistic characteristics of the relevant market providing further arguments that are typically used in relation with an abuse of dominance, it incriminated the supplier and the remaining buyer under article 5 of the Competition Law (dealing with anti-competitive practices).

As regards tying and bundling, the Government Ordinance No. 99/2000 regarding the sale and advertisement of products and services on the market expressly prohibits conditional sales, which is defined as conditioning the sale of one product upon the purchase of a certain quantity of that product or the simultaneous purchase of a different (unrelated) product or service. The provision of a service conditioned upon the provision of a different service or the purchase of a different product is also equated to a conditional sale. The authority competent to investigate tying practices and apply sanctions under the aforesaid legal provisions is the National Authority for Consumer Protection. Additionally, the Competition Council has the opportunity to apply article 6 of the Competition Law should the selling company be dominant and to impose fines if the conduct is abusive.

Whereas tying is prohibited per se irrespective of the market share of the company involved in the tying, bundling is normally permitted as it is a mere inducement rather than a compulsion to buy a product or service along with another product or service.

25 Abuse of dominance

Describe how the exercise, licensing, or transfer of IP rights can relate to abuse of dominance.

Whenever an assessment of a company's position on the market is carried out, special attention is also paid to the IP rights portfolio that it holds. Nonetheless, the ownership of an important IP portfolio does not necessarily lead to the conclusion that such a company enjoys a dominant position. Several other criteria need to be assessed on a case-by-case basis, for example, the actual market share of the company either on the market of the products that bear the protected IP rights or of the products that are produced according to a patented technology or that are the result of a patented invention.

Consequently, if the owner of an IP portfolio is to be considered dominant on one or more markets, as the case may be, any abuse of its use of the IP rights owned may be assessed under and remedied as per the provisions of the Competition Law.

However, the sovereign rights vested by IP enactments to the holder of such rights and then duly exercised are generally compatible

Update and trends

Following the European Commission's final report regarding its recent sector inquiry on the pharmaceutical market and the envisaged administrative amendments intended to facilitate the immediate entrance of generic products into the market, it is reasonable to anticipate a great volume of cases leading to a final and clear stance of the Competition Council and the domestic courts in relation to the boundaries between the lawful and unlawful exercise of IP rights.

with competition rules. Nonetheless, the imposition of discriminatory conditions on licensees that are in the same economic position, abusive pricing practices in respect of the granting of a licence, tying and refusal to deal may fall under the scrutiny of the Competition Council as per the provisions of article 6 of the Competition Law.

26 Refusal to deal and essential facilities

Describe how the exercise, licensing, or transfer of IP rights can relate to refusal to deal and refusal to grant access to essential facilities.

In the case of firms controlling networks, especially those that can be considered as essential facilities, the most frequent abusive behaviour is the denial of access to the network. In these cases, the most important remedy consists of compelling the dominant firm to grant the access to its network to all its competitors or clients, without discrimination.

The Competition Council applies the indispensability test according to which the refusal to supply is deemed abusive if there is no alternative under equivalent conditions. Whether the or not conditions are equivalent is determined on a case-by-case basis, taking due account of legal and factual issues.

Remedies**27 Remedies for violations of competition law involving IP**

What sanctions or remedies can the competition authority or courts impose for violations of competition law involving IP?

In the case of breach of the provisions of the Competition Law, individuals or legal entities have the right to claim in court the complete remedy to the damages incurred by them as a consequence of prohibited anti-competitive practices, irrespective of and in addition to the sanctions enforced by the Competition Council in compliance with the provisions of the law.

Plaintiffs are entitled to seek interim relief by way of a request for preliminary injunction, compensation for damages and the acknowledgement of their IP rights by the court.

In the case of breach of the Competition Law, the Competition Council may impose fines and take the necessary measures to ensure compliance with the legal provisions in the competition sector.

Where such measures are not observed by the defaulting entities, the Competition Council may request the Bucharest Court of Appeal to enforce one of the following measures:

- annulment of contracts or contractual clauses under which the dominant position is abusively exploited;
- annulment of the act or acts under which an economic concentration has created a dominant position, even if the issued legal act or acts have established a new legal entity;
- limitation or prohibition of access to the market;
- selling of the company's assets; or
- restructuring of the company by spin-off.

Any interim measure that temporarily provides protection of the plaintiff's rights before a final decision has been reached is available in front of the civil courts. The court may decide on an interim measure in the following alternative situations:

- any delay in reaching a decision may lead to the permanent loss of the plaintiff's alleged right;
- the necessity of avoiding an imminent loss that cannot be otherwise recovered; or
- the necessity of removing any obstacles regarding the enforcement of the final decision.

The relevant civil court grants compensation to the plaintiff for the damages caused by breach of the Competition Law, taking into consideration the actual and certain damages incurred by the plaintiff. The compensation for the damages has to include both actual losses suffered (*damnum emergens*), as well as lost profits (*lucrum cessans*). Furthermore, damages caused by the defendant both intentionally as well as negligently (if the latter situation has not been excluded based on the mutual agreement of the parties) are taken into account when the claimant requests compensation.

28 Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

The competition laws do not expressly specify any remedies that are specific to IP matters. However, the practice of the Competition Council reveals that in cases dealing with IP rights assignment or uses, certain remedies are preferred over others. For more details, please refer to question 21.

29 Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

As previously detailed, within the context of a merger, the Competition Council accepted long-term trademark licences as a remedy, either exclusive or non-exclusive, and also trademark assignments.

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Within the context of anti-competitive practices and abuse of dominant position, the Competition Council also forced the dominant firm to grant access to its products that amounted to an essential facility.

30 Scrutiny of settlement agreements

How will a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective?

Like any other agreement, the agreement terminating an IP infringement dispute must be in line with the competition legislation. No specific provisions apply to exempt the said agreement from the competition provisions.

Economics and application of competition law**31 Economics**

What role has economics played in the application of competition law to cases involving IP rights?

The application of the Competition Law may limit the extent to which the IP right holders may achieve the economic benefits.

Moreover, economic efficiency was acknowledged by the competition authority as a valid defence for justifying what may otherwise constitute an abuse of a dominant position or an anti-competitive practice involving an IP right holder. The rationale behind this approach is that the core aims of the competition laws are the promotion of consumers and the creation of efficiencies, rather the protection of competitors on the market. However, in order for the economic efficiency to stand as a defence a number of criteria have to be satisfied, such as the condition of a product or service being indispensable for economic efficiency to be achieved and that the efficiency benefits consumers.

32 Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

Details pertaining to the recent cases dealing with the interface between IP and competition laws have already been provided previously.



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